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No. 73-941

In the Supreme Court of the United States

OCTOBER TERM, 1973

ELIZABETH HOLTZMAN, ET AL., PETITIONERS

v.

JAMES R. SCHLESINGER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Department of Justice,
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Petitioners, a Congresswoman and present and former Air Force officers, instituted this suit for declaratory and injunctive relief, alleging American involvement in combat hostilities in Cambodia to be unconstitutional. The district court granted petitioners' motion for summary judgment and enjoined the respondents from participating in any hostilities in Cambodia.[1] On an expedited appeal from the district court's decision, the court of appeals reversed on the ground that the case presented a non-justiciable political question.[2]

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[1] 361 F. Supp. 553. The district court's order was ultimately stayed by Mr. Justice Marshall acting as Circuit Justice with the agreement of seven other members of this Court. Mr. Justice Douglas dissented. See 414 U.S. 1321. (Marshall, J., Circuit Justice); see also 414 U.S. 1304 (Marshall, J., Circuit Justice); 414 U.S. 1316 (Douglas, J., Circuit Justice).

[2] Pet. App. 1a-25a 484 F. 2d 1307, rehearing denied, September 17, 1973 (Pet. App. 26a-27a).

1. This suit was brought prior to the termination of American combat activities in Cambodia on August 14, 1973.[3] The cessation of American combat activity in Cambodia on that date plainly moots the case. The controversy has been put to rest by the joint action of the other branches of government. Without this "immediacy or reality", there is no jurisdiction or need for review in this Court.[4] *Golden* v. *Zwickler*, 394 U.S. 103.

2. In any event the question presented here is essentially the same one which has been before this Court numerous times: whether United States' participation in Southeast Asia is unconstitutional because it had not been properly authorized by Congress. For the reasons stated on pp. 17-42 of our Brief for the Defendants opposing the Motion for Leave to File Complaint in *Commonwealth of Massachusetts* v. *Laird*, No. 42 Original, October Term, 1970, motion denied, 400 U.S. 886, we submit that this is a nonjusticiable political question which is neither susceptible to judicial determination nor judicial relief. See *Baker* v. *Carr*, 369 U.S. 186; *Powell* v. *McCormack*, 395 U.S. 486. Moreover this question has now received a political solution, in that, following the enactment of P.L. 93-

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[3]See August 15, 1973 Statement by the Deputy White House Press Secretary: Termination of U.S. Combat Activity in Cambodia, 9 Weekly Compilation of Presidential Documents 984.

[4]Petitioners' allegation that Captain Dawson might face a court martial in which the legality of his orders to bomb Cambodia may be at issue (Pet. p. 5, n. 2; p. 21) has been mooted by his honorable discharge (the Brief for Petitioners, p. 2). Nor does the grounding of two of petitioners make the questions of legality presented by the petition any less moot.

52, 87 Stat. 130 on July 1, 1973,[5] American combat activity in Cambodia was terminated. Cf. *Drinan* v. *Nixon*, No. 73-1271, August 10, 1973 (C.A. 1), affirming 364 F. Supp. 853 (D. Mass.).

Furthermore, the court below recognized that in order to reach the issue raised by plaintiffs, a court must first make a determination that continued military participation in Cambodia after the withdrawal of American troops from Vietnam represents a "basic change" in the situation of a type that would require an independent showing of congressional authority. The court correctly concluded that this preliminary determination itself involved a non-justiciable political question because it required information as well as military and diplomatic expertise far beyond the judicial domain (Pet. App. 6a-12a). Thus, this case presents political questions at two levels of analysis and, therefore, is even less appropriate for judicial intervention than

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[5]P.L. 93-52, 87 Stat. 134, provides in part:

> Sec. 108.
>
> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

the cases which dealt primarily with the conflict in Vietnam.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[6]See, *e.g.*, *Massachusetts* v. *Laird*, *supra*; *Atlee* v. *Laird*, 347 F. Supp. 689 (E.D. Pa.), affirmed, 411 U.S. 911; *Sarnoff* v. *Connally*, 457 F. 2d 809 (C.A. 9), certiorari denied, 409 U.S. 929; *DaCosta* v. *Laird*, 448 F. 2d 1368 (C.A. 2), certiorari denied, 405 U.S. 979; *Orlando* v. *Laird*, 443 F. 2d 1039 (C.A. 2), certiorari denied, 404 U.S. 869; *Berk* v. *Laird*, 429 F. 2d 302 (C.A. 2), certiorari denied, 404 U.S. 869; *Simmons* v. *United States*, 406 F. 2d 456 (C.A. 5), certiorari denied, 395 U.S. 982; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934; *Luftig* v. *McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Massachusetts* v. *Laird*, 451 F. 2d 26 (C.A. 1). The courts declined to reach the merits of the controversy in each of the above cases involving the issue whether the proper distribution of war-making powers raised a political question. Courts have also recognized as other bases for dismissing such actions that the plaintiff lacked standing, see *e.g.*, *Ashton* v. *United States*, 404 F. 2d 95 (C.A. 8), ceritorari denied, 394 U.S. 960; *Kalish* v. *United States*, 411 F. 2d 606 (C.A. 9), certiorari denied, 396 U.S. 835; *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042, or that the suit was an unconsented suit against the government, see, *e.g.*, *Velvel* v. *Nixon*, *supra*; *Luftig* v. *McNamara*, *supra*.